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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

- v -

RALPH P. FORBES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK ON BEHALF OF PETITIONER

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INTEREST OF AMICUS CURIAE

The City of New York ("City") submits this brief as amicus curiae on behalf of petitioner pursuant to Rule 37, subdivision 4. The City urges the Court to uphold the position of the Petitioner in the instant case, and thereby to protect and encourage non-partisan publicly supported efforts to inform and enlighten the public, of which the City's new debate law (Local Law No. 90 of 1996,

hereafter, the "NYC debate law"), set forth, infra, p. 11, is an example.

The NYC debate law was enacted by the New York City Council and signed into law by Mayor Rudolph W. Giuliani on December 2, 1996. The law requires candidates for the three citywide offices of mayor, public advocate, and comptroller, who join the voluntary New York City Campaign Finance Program (hereafter, the "Program") and appear on the ballot, to participate in debates as a condition for receiving public matching funds for their campaigns.[1] See Local Law No. 90 of 1996, codified in New York City Administrative Code § 3-709.5.

Under the NYC debate law, these candidates are required to take part in two debates prior to the primary election and in the first of two debates prior to the general election. The two primary election debates and the first general election debate are open to all candidates who

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[1] The New York City Campaign Finance Program was created by passage of Local Law No. 8 of 1988, the New York City Campaign Finance Act. The Program makes public matching funds available to candidates for elective municipal office who agree to limit the size of the contributions they accept and the amount of money they spend on their campaigns and to provide detailed disclosure of their campaign finances. To qualify to receive public funds that match, up to $1,000, contributions received from individual New York City residents, participating candidates must meet certain threshold fund raising requirements and must be on the ballot. The NYC debate law is the most recent amendment to the City's comprehensive campaign finance reform.

participate in the Program. A second general election debate, however, includes only the "leading contenders" for the relevant office as defined by predetermined objective criteria. This debate may include leading contenders who are not participating in the Program, and is required for those leading contenders who participate in the Program. In addition, an alternate nonpartisan voter education program is provided for Program participants who are not "leading contenders" and thus are not included in the second general election debate.

The NYC debate law provides for the New York City Campaign Finance Board ("CFB"), an independent agency of New York City government, to select organizations to sponsor the debates.[2] The sponsors administer the debates. Sponsors may not be affiliated with any political party or candidate for public office and may not endorse any candidate in the pending election until after the debate in which they are involved. Potential sponsors must set forth objective, non-partisan, and non-discriminatory criteria that they intend to use to identify leading contenders for purposes of the second general election debate.

The NYC debate law serves two distinct public purposes: (1) ensuring that candidates for citywide office will not be able to receive public matching funds without meeting in "face-to-face" debates; and (2) promoting voter

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[2] The debate law provides that the CFB may accept an application "subject to modifications as it deems appropriate and as are acceptable to the sponsor." New York City Administrative Code § 3-709.5(7).

education by bringing about a moderated reciprocal discussion among opposing candidates.

The provisions of the NYC debate law balance these two goals. Limiting participation in the debates to candidates who have joined the Program, in general, avoids giving an unfair strategic advantage to candidates who do not join the Program and so would otherwise be able to choose based upon campaign strategy whether or not to attend a forum their participating opponents are obligated to attend. Such an unfair advantage could result in a disincentive for joining the Program and, thus, threaten to undermine the City's successful voluntary campaign finance reforms. On the other hand, by providing that candidates who do not join the Program will be invited to the final general election debate if they meet objective "leading contender" criteria, the law seeks to provide the public with at least one forum at which it can view the top opposing candidates, whether or not they are in the Program.

Because the Eighth Circuit's decision, if affirmed and given an expansive reading, could discourage affirmative efforts like the NYC debate law, the City is submitting its views in the instant case.

ARGUMENT

THE EIGHTH CIRCUIT DECISION POTENTIALLY THREATENS THE ABILITY OF GOVERNMENT TO PROMOTE CAMPAIGN DEBATES, WHICH FURTHER CAMPAIGN FINANCE REFORM AND EDUCATE THE PUBLIC; NEW YORK CITY'S PROGRAM IN PARTICULAR FURTHERS THESE GOALS.

By creating the risk that every decision to include or exclude an individual in a discussion or debate will be viewed as a decision to exclude that individual from a "limited public forum," the Eighth Circuit's decision may foster debilitating litigation surrounding the holding of such events, if they are still held at all. Reasonable public education efforts, engaged in with the non-partisan good faith intention of furthering public knowledge of and interest in public policy issues and the electoral process, should not be subjected to such elevated scrutiny. By transforming a reciprocal discussion before an audience (whether a "live" audience or a "broadcast" audience) into a "limited public forum," the Eighth Circuit decision could have the effect of discouraging such efforts.

The NYC debate law has been carefully constructed to ensure that it would be sustained under even close First Amendment scrutiny. Nevertheless, the fundamental objectives of the NYC debate law -- to give the public debates in return for tax dollars made available to Program participants and to educate the public on the views of the candidates -- could be compromised if any decision of this

Court were construed to require that all political debates in any way initiated by a government entity must include all candidates, or to apply an overly stringent level of scrutiny to a non-partisan decision to exclude a candidate. This Court has recognized that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." Timmons v. Twin Cities Area New Party, 65 U.S.L.W. 4273, 4275 (Apr. 28, 1997) (upholding state law prohibiting fusion candidacies).[3]

In another context, this Court has stated that "the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 376 (1969). The Eleventh Circuit applied this doctrine in the debate context in Chandler v. Georgia Public Telecommunications Com'n, 917 F.2d 486, 489 (11th Cir. 1990), cert. denied, 502 U.S. 816 (1991), finding that a state's judgment as to which candidates may participate in debates was not "viewpoint restrictive" and did not violate the First Amendment rights of excluded candidates. The Eleventh Circuit's ruling recognized that adopting an inclusionary rule might force television stations "to forego the broadcast of controversial views touching upon

[3] Because it is undisputed in the instant case that the Arkansas Educational Television Commission is a state actor, this amicus brief does not address the state action issue. While the City believes that its limited role under the debate law is clearly distinguishable from state-entity-sponsorship, we also recognize that the NYC debate law entails some government involvement in bringing about debates among candidates.

important public issues . . . lest the airing of such programs require the inclusion of a cacophony of differing views on each subject. The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television." Id. at 489-90. See also Marcus v. Iowa Public Television, 97 F.3d 1137, 1141 (8th Cir. 1996) (in a public television broadcast of a joint candidate appearance, Eighth Circuit distinguished the instant case and determined not to interfere with discretionary choices made by a public broadcaster in fulfilling its "primary mission of serving the public"). Indeed, the danger of an overly restrictive approach in this area, recognized in Chandler, perhaps explains why the outcome thus far in this case does not conform to the view of several Federal courts that have confronted debate participation in reported decisions. Johnson v. Federal Communications Commission, 829 F.2d 157, 164-166 (D.C. Cir. 1987); Fulani v. League of Women Voters Education Fund, 684 F. Supp. 1185, 1192 n. 4 (S.D.N.Y., 1988), aff'd, 882 F.2d 621 (2d Cir. 1989); Martin-Trigona v. University of New Hampshire, 685 F. Supp. 23, 25 (D.N.H. 1988); Koczak v. Grandmaison, 684 F. Supp. 763, 764 (D.N.H. 1988).

Without the discretion to structure debates in a manner that fulfills government's duty to provide information to the public, debates can be unwieldy and counterproductive to voter education. As long as its decisions are neutral and unbiased with respect to candidate viewpoint and political affiliation, government should be afforded the flexibility to make reasonable choices for bringing about debates among candidates that will best serve to fulfill the goals of campaign finance reform and to inform the voting public.

The City believes that imposition of stringent criteria for public support of debates or other public events would lead to a number of harmful consequences. First, some entities would undoubtedly abandon their sponsorship of debates in the future rather than hold debates that include too many participants.[4] Without debate sponsors, New York City would be unable to implement its debate law, and New York City candidates for citywide office would once again be able to receive public matching funds without having to participate in debates. Second, debates attended by a large number of candidates could be unwieldy, unmanageable, and confusing to the public. Debates should afford candidates the opportunity to engage in a focused and informative reciprocal exchange, and give the public the opportunity to benefit from such an exchange.

The contrast between the particular approach taken by the Arkansas Educational Television Commission and that of the NYC debate law demonstrates that the circumstances, resources and needs of thousands of public entities will result in many different approaches to holding debates and other discussions before audiences, with a variety of non-partisan criteria being used to include or exclude participants. In many cases, the discussion may be a fairly informal one, for which complex and formalized criteria would be burdensome and inappropriate. For example, a panel discussion on a government-owned public television station concerning an election-related event that

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[4] In fact, the Nebraska Education Television Network, a state-entity licensee, did cancel a debate in August 1996 as a result of calls by lesser known candidates to be included. See Marcus v. Iowa Public Television, supra, 97 F.3d 1137, 1141 (8th Cir. 1996).

occurred on the same day cannot be weighed down by complex panelist selection criteria. In the case of the NYC debate law, the City has opted to further the values of campaign finance reform and public education through a more comprehensive structure that it has developed several months in advance of the first debates to be held under the City's law.[5] The ability of public entities to develop these varying approaches, indeed to act as a "proving ground" or "laboratory" for public enlightenment and campaign finance reform, is placed at risk by the inappropriate heightened scrutiny imposed by the Eighth Circuit.

The limitations on who will participate in debates under New York City's particular scheme, including the limitation to leading contenders in the general election debate, do not, in any way, reflect agreement or disagreement with any candidate's political views or affiliation. The limitations provide a balance between the inclusionary but objective approach taken in the three earlier debates (which all Program participants on the ballot in the relevant election must attend) and the goal of having at least one debate in which voters can see a focused, in-depth discussion among leading contenders, as reflected by

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[5] Moreover, under the NYC debate law, the candidates ultimately included in the leading contenders debate are determined only after the objective, non-partisan, and non-discriminatory criteria for leading contenders are set and all the other debates have been held. Thus, the debate law provides an opportunity for lesser known candidates to make their case to the public in as many as three debates which, in turn, may result in higher public opinion poll numbers and ultimate inclusion in the leading contenders debate.

objective measures of public support. The latter aspect of the NYC debate law recognizes the value of limiting the number of candidates in a political debate at the conclusion of the campaign period for a more manageable and informative experience for the voting public.

New York City's debate law was enacted to seek to promote voter education and to bring about at least one debate focussed on the leading contenders. It is respectfully submitted that such creative efforts to enlighten the public should not be endangered by an overly restrictive "public forum" analysis that could potentially be applied to a broad spectrum of governmental activities in which no "public forum" has been explicitly designated. Although the determination of the Eighth Circuit does not directly apply to New York City's debate program, which is different from the Arkansas program, an affirmance would

have the potential to stifle the development of such public-spirited activities; such determination should therefore be reversed.

Respectfully submitted,

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Appendix
N.Y.C. Debate Law

§ 3-709.5 Mandatory debates. 1. In any year in which a primary, runoff primary, general or special election is to be held, any participating candidate for nomination or election to a city-wide office shall participate in two pre-election debates held pursuant to this section for each election in which he or she is on the ballot except that in the second general election debate the candidate shall meet such criteria for participation as may be specified in the application submitted by the debate sponsor pursuant to paragraph (b) of subdivision five of this section. In the case of a primary, the debate shall be among participating candidates seeking nomination of the same political party. If there is no contested primary for an office in a political party then no debate for that party's nomination shall be held pursuant to this section. Each debate held pursuant to this section shall be at least one hour's duration.

2. For purpose of this section, a "debate" shall mean the moderated reciprocal discussion of issues among candidates on the ballot for the same office.

3. The campaign finance board shall select sponsors for two debates for each election in which debates among participating candidates are required pursuant to this section. For a general election, the second debate shall be a debate among the leading contenders for the office, as described in paragraph (b) of subdivision five of this section.

4. Organizations which are not affiliated with any political party or with any holder of or candidate for public

office, which have not endorsed any candidate in the pending primary, special, general, or runoff election for the city-wide office shall be eligible to sponsor one or more of the required debates. The rules for conducting such debates shall be solely the responsibility of the organizations selected but shall not be made final without consultation with the campaign finance board. The organizations selected shall be responsible for choosing the date, time and location of the debates.

5. Written applications by organizations to sponsor an election debate shall be submitted to the campaign finance board on a form provided by the board not later than a date chosen by the board in any year in which an election is held for city-wide offices.

(a) The written application shall:

(i) demonstrate that the organization and any proposed co-sponsor meet the criteria of subdivision four of this section;

(ii) specify the election and office for which the organization seeks to sponsor the debate;

(iii) set forth the date, time, duration, and location of the debate and the specific and exclusive circumstances under which the date or time may be changed, together with a provision for when the rescheduled debate would be held;

(iv) provide a detailed description of the format and ground rules for the debate;

(v) verify that the staging, promotion, and coverage of the debate shall be in conformance with all applicable laws;

(vi) include an agreement to indemnify the city for any liability arising from the acts or omissions of the sponsor; and

(vii) set forth plans for publicity and for broadcast and other media coverage for the debate.

(b) (i) The second debate for a general election shall include only those candidates who the sponsor has determined are the leading contenders for the office on the basis of objective, non-partisan, and non-discriminatory criteria. These criteria must be set forth in the sponsor's written application.

(ii) If the sponsor of the second general election debate has determined that a candidate who is not a participating candidate is a leading contender for the office on the basis of such criteria, the sponsor may invite that candidate to participate in the debate. In the case of a runoff primary election, the sponsor may invite a non-participating candidate to participate in the debate(s). However, if a non-participating leading contender does not accept such invitation to debate or does not appear at such debate, the debate shall go forward as scheduled with the other previously selected leading contender or contenders in the case of a second general election debate or participating candidate on the ballot in the case of a runoff election debate.

(c) In the case of the second general election debate, the application shall also provide for an alternative non-partisan voter education program that the sponsor shall provide for any participating candidates not deemed leading contenders.

6. Prior to choosing a sponsor, the board shall provide for the receipt of comments from interested persons regarding the qualifications of potential sponsors. The board shall consider and give substantial weight to such comments submitted by candidates.

7. Based upon the criteria in subdivision 4 above and any comments received pursuant to subdivision 6 above, the board shall select the organization or organizations to sponsor the election debates and shall provide written notification to the organization or organizations so selected. In addition to the sufficiency of the application, the board shall consider the applicant's ability to reach a wide audience and present a fair and impartial debate. The board may accept an application subject to modifications as it deems appropriate and as are acceptable to the sponsor.

8. For the two primary debates and the first general election debate, the board shall provide each debate sponsor it has selected with a list of candidates who are required to participate in such debates.

9. If a candidate fails to participate in any debate required under this section before an election, the candidate shall be liable for return of moneys previously received for use by the candidate to pay election campaign expenses and shall be ineligible to receive any further matching funds for

that election. For purposes of this subdivision, each primary, general, special or runoff election shall be considered a separate election.

10. Following the submission of a petition on behalf of the candidate and a hearing before the board, the penalty applicable to a participating candidate for failure to participate in any debate as required under this section shall be waived upon a determination by the board that the failure to participate in the debate occurred under circumstances beyond the control of the candidate and of such nature that a reasonable person would find the failure justifiable or excusable.

11. Nothing contained in this section shall preclude any candidate from agreeing to participate in any number of additional debates between any and all candidates for a city-wide office, including those candidates not participating in the campaign finance program. These debates need not be held under guidelines or the purview of the campaign finance board.